NO. 90-1088

Supreme Court, U.S.
FILED
DEC 26 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

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EVA O. RETTIG, Cross-Petitioner

v.

KENT CITY SCHOOL DISTRICT;
DONNA G. LIGHTEL, In her Official Capacity as Superintendent, Kent Public Schools;
MICHAEL J. CHRIN, In his Official Capacity of Director, Child Study and Special Education, Kent Public Schools;
BOARD OF EDUCATION OF THE STATE OF OHIO;
FRANKLIN B. WALTER, In His Official Capacity as Superintendent for Public Instruction of the State of Ohio, Respondents.

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*CROSS-PETITION*
*FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

---

EVA O. RETTIG, pro se
586 Francis Street
Kent, Ohio 44240
(216) 678-0988

## QUESTION PRESENTED

Whether the parent of a handicapped person who is the prevailing party in an action brought under the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution, 42 U.S.C. 1983; under the Education of the Handicapped Act as amended by the Handicapped Children's Protection Act of 1986, 20 U.S.C. 1400 *et seq.*; and under the Rehabilitation Act of 1973, as amended in 1986, 42 U.S.C. 2000d-7, is entitled to an award of reasonable attorneys' fees and costs for expert witnesses, including independent educational evaluations and expenses for parent training programs, and expenses for transportation, as part of the costs for actions and proceedings brought after July 3, 1984, and those brought prior to July 4, 1984 which were pending on July 4, 1984?

## LIST OF PARTIES

The parties in the courts below were this Cross-Petitioner Mrs. Eva O. Rettig, her son Thomas M. Rettig, the original Petitioner in Case #90-6388, against all Respondents identified in the caption of the case. The original Petition was received in This Court on 27 November 1990.

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To the Honorable William Rehnquist the Chief Justice and Associate Justices of the Supreme Court of the United States:

Mrs. Eva O. Rettig, the Cross-Petitioner herein, prays that a writ of certiorari issue to review the Judgment and Opinion of the Court of Appeals for the Sixth Circuit which affirmed the United States District Court's dismissal under Fed. R. Civ. P. 12(b)(6) without summary judgment in accordance with Fed.. R. Civ. P. 56. As provided by S. Ct. R. 16.1, both the original Petition and this Cross-Petition are prime candidates for a summary reversal for these Petitioners.

## OPINIONS BELOW

The Opinion of the Sixth Circuit Court was ordered to be unreported; App. VOL. III AA contains a true copy. VOL. III A contains the unpublished Memorandum

Order of the United States District Court. Court action was preceded by the exhaustion of administrative remedies. Those are included in VOLS. I and II.

## JURISDICTION

Petition No. 90-6388, on which this Cross-Petition relies, was received on 27 Nov. 1990. This Court's jurisdiction is invoked under 28 U.S.C. 2106 which provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

## CONSTITUTIONAL AND STATUTORY PROVISIONS

In 1986, Congress amended Sec. 615 of the Education of the Handicapped Act (EHA) with the Handicapped Children's Protection Act of 1986 (HCPA), 20 U.S.C. 1415. The text of relevant provisions is included in the App. to the original Petition. VOL.

IV Sec. J.

## STATEMENT OF THE CASE

On 5 July 1984, This Court filed its Opinion in Smith v. Robinson, 104 S. Ct. 3457 holding, in part:

> We conclude, therefore, that where the (EAHCA) is available to a handicapped child asserting a right to a free appropriate public education, based either on the (EAHCA), or on the Equal Protection Clause of the Fourteenth Amendment, the (EAHCA) is the exclusive avenue through which the child and his parents or guardian can pursue their claim.

104 S. Ct. at 3470. This holding impacted on Petitioner and Cross-Petitioner's dismissal under Fed. R. Civ. P. 12 (b)(6) by the District Courts in 1986 and in 1989. App. III I 120, 121; A 90, 91, 93.

According to Senate Report No. 99-112 accompanying the HCPA of 1986, Congress specifically enacted the HCPA to overturn Smith. Sec. 2 provides for attorneys' fees as part of the costs to the parents of a handicapped person who is the

prevailing party. Sec. 3 provides that the EHA does not limit the applicability of other laws which protect handicapped individuals, including the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Finally, Sec. 5 of the HCPA authorizes courts retroactively to award attorneys' fees for

> actions or proceedings brought under section 615 of the EHA after July 3, 1984, and actions and proceedings brought prior to July 4, 1984 under such section which were pending on July 4, 1984.

VOL. IV Sec. J. On 4 July 1984, Petitioner and Cross-Petitioner had actions pending both in the Sixth Circuit Court and in the District Court. App. VOL. III F; and VOL. III I. Admin. remedies were exhausted prior to each of those actions. App. VOL. II. Between 12/12/86 and 7/31/87 Petitioner and Cross-Petitioner once more exhausted admin. remedies. VOL. I; they are still praying for the appropriate remedy. VOL. III AA.

This Cross-Petitioner has a vested interest in the full enforcement of her son's --Petitioner in Case # 90-6388-- rights to compensatory special education and related services together with all damages due him: she continues to pray for her statutorily guaranteed opportunity for full participation in the development of Thomas Rettig's free appropriate public education and his pursuit of life and gainful employment in Kent, Ohio; she also seeks the return of the monies spent due to Respondents' refusals.

In 1974, Cross-Petitioner and her husband together with Petitioner attended the parent training program of the Judevine Center for Autistic Children in St. Louis, MO. They had to pay for this service and for the psycho-educational evaluation of Petitioner because (1) Local Respondents refused Petitioner the residential placement the experts at Cleveland Metropolitan General Hospital

had recommended; and (2) they refused to provide the parent training. Std. EDb-215-09 provided for "planning, implementing, and monitoring intervention strategies" to assist parents. VOL. IV Index 1973, p. 47. Further, Sec. 3323.01 specifically made funds available to Local Respondents for this assistance to parents. Index 1974.

In 1975 Petitioner and Cross-Petitioner were hospitalized in Chicago to ascertain Petitioner's allergies. The doctor prescribed a simple "diversified rotary diet." According to this diet, Petitioner could neither purchase nor consume school lunches. His meals had to be specially prepared according to the doctor's instructions. The school refused to teach Petitioner to prepare the simple meals. Thus, for the years 1975-76, 76-77, and 77-78, Cross-Petitioner had to prepare and drive them daily to Petitioner whose class then was housed at the Kent State University School.

20 U.S.C. 1415 provides for "independent educational evaluations" and "hearing rights." App. VOL. IV Sec. J. In 1976, Cross-Petitioner requested that Local Respondents conduct for Petitioner a "multi-factored evaluation" (MF-E). Local Respondents refused to conduct a MF-E in accordance with Std. 3301-51-18(C) which was to serve as the basis of Petitioner's "individualized education program" (IEP) in accordance with Std. 3301-51-18(D). Therefore, in 1978, Cross-Petitioner requested a "due process hearing" which was to verify and require compliance with procedural safeguards, in accordance with State Standards 3301-51-18, of Local Respondents' development and implementation of an appropriate IEP for Petitioner. Such a "due process hearing" required no expert witnesses. However, because no hearing regarding verification with State Standards was provided, Cross-Petitioner was forced to hire several

expert witnesses from the Judevine Center who also conducted their own psycho-educational evaluation of Petitioner.

In 1979, Cross-Petitioner asked Respondent State Board to provide the compliance verification required by EHA's 1415(c). State Respondents refused to verify compliance with State Standards. Although Respondent State Board ordered the State and Local Respondents to seek "expert help in the future planning of Tommy Rettig's educational program," Cross-Petitioner was denied her right to participate; instead Respondents demanded that Petitioner's parents be replaced by parents from two other states. Thus, no MF-E of Petitioner's needs was conducted as required by EHA Regulation 121a.534 and by Respondent State Board. Petitioner's entire pre-school and elementary education was not based on the child study and MF-E required by State Standards.

In 1981, the District Court ordered

Local Respondents to conduct a MF-E in "strict compliance" with procedural safeguards and accorded the right to parental participation. The 1981 "evaluation" denied parental participation, and it failed to meet Std. 3301-51-18(C). Cross-Petitioner sought District Court intervention. Respondents opposed. Therefore, in 1982-83 Cross-Petitioner sought to challenge the bastard evaluation at a "due process hearing." Again, State Respondents refused EHA verification with State Standards and again affirmed Respondents' denial of Petitioner's right to free appropriate public education (FAPE) and services in accordance with procedural safeguards required by State Standards and by the EHA and the Rehab Act. In 1983, Cross-Petitioner filed another action in the District Court. Not unlike the other courts in this case, no procedures were reviewed by this Court either.

In 1984, Respondents refused to conduct the re-evaluation required by EHA Regulation 121a.534. Therefore, Cross-Petitioner paid for an independent educational evaluation by Dr. LaVigna of Los Angeles, CA, an expert in autism. His recommendations might have been implemented for Petitioner by Judge Lambros for school years 1983-84, 84-85, 85-86, and 86-87 had Respondents not opposed the Court's intervention. App. VOL. III I, 66 ff.

Since June 1987, Respondents have been refusing to provide Petitioner any and all services. At that time this law suit under Sec. 1415's "Stay-Put" provision was pending before State Respondents. Thus, in 1987, this Cross-Petitioner paid for another independent educational evaluation and recommendations by that same expert.

Since 1979, Cross-Petitioner has been seeking federal court adjudication of

State Respondents' EHA-violative review procedures of Local Respondents' outright refusals to design and implement for Petitioner an IEP meeting the requirements of relevant O.R.C. sections and of the procedural safeguards of State Standards throughout the years they were obligated so to do: 1970 to 1990 and ongoing.

REASONS FOR GRANTING BOTH PETITIONS

This Court of Last Resort is fervently urged to grant Petition #90-6388 and this Cross-Petition because justice demands adjudication of these federal claims under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. This lawsuit spans a period of twenty formative years in the life of a person who is handicapped. Petitioner's pre-school and elementary school age years were not adjudicated by any court in accordance with This Court's directive in

Bd. of Educ. of the Hendrick Hudson Central School District v. Rowley, 458 U. S. 176 (1982), at 3051. VOL. III. C 10; D 1, 2; F 4; G 1. Petitioner's high school age years remain dismissed under Fed. R. Civ. P. 12(b)(6) without proper summary judgment required by Fed. R. Civ. P. 56. VOL. III A 101; I 122.

The Opinion of the Sixth Circuit Court is twenty-four lines long, stating in part:

> Having carefully reviewed the briefs of the parties and the record on appeal, we conclude that the district court's analysis found in its memorandum and order of July 28, 1989 was correct. Because we agree with the reasoning articulated by the district court as the basis for the dismissal, issuance of a written opinion by this court would be duplicative and serve no useful purpose.
> Furthermore, it appears that the case is moot, since in view of Thomas age, it appears that he is no longer entitled to the protections and benefits of the Act which limits eligibility to children between the ages of three and twenty-one years of age. Honig v. Doe, 484 U.S. 305, 318 (1988).
> Accordingly, for the reasons stated, the orders of the district court dismissing the action and denying a new trial are affirmed.

VOL. III AA 8. Cross-Petitioner relies on the briefs she filed in the court below as well as on the three administrative records which no administrative agency nor federal court has yet reviewed. This Court's Clerk's Office received as the App. to the original Petition, as required by S. Ct. R. 14(k): two VOLS. constituting the administrative record; one VOL. court proceedings which are necessary because those proceedings remain wrongfully applied as a bar to the present action; and one VOL. containing the text of federal and Ohio laws.

As the record shows, Petitioner requested his own "due process hearing" under O.R.C. Sec. 3323.05 some six months before he turned twenty-two. O.R.C. Sec. 3323.01(A) provides special education and related services to "handicapped children" under twenty-two years of age. In his petition, he has asked This Court to

adjudicate under the Due Process and Equal Protection Clauses State Respondents' EHA-violative review procedures of the so-called special education accorded him by Respondents under all applicable sections of the Ohio Revised Code and in accordance with procedural safeguards required by all State Standards. He pleads for the "independent decision" which the EHA guarantees him and which State Respondents have been denying him. The federal court judgments have been applied as a bar and are unjust and manifestly wrong.

This Cross-Petitioner also has exhausted all administrative remedies. She has been a party-plaintiff since 1978 and in This Court joins Petitioner in fervently praying for the appropriate remedies under the EHA and Section 504's implementing regulations; and she pleads for the return of the monies Respondents' actions and refusals required her to spend

over the years involved in this lawsuit.

Following This Court's decision in Burlington School Committee v. Dept. of Educ. of Massachusetts, 471 U.S. 359 (1985), courts have fashioned appropriate remedies for school systems' violations of the EHA.

In Burlington, the father of a handicapped child withdrew his son from the public school and enrolled him in a private school. After completion of administrative and judicial review of the public school's educational program for his son, This Court awarded the father the reimbursement for the private school tuition. Section 1415(e)(2) of the EHA provides for judicial review of the administrative decisions, and requires that "the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party ... and shall grant such relief as

(it) determines is appropriate." Chief Justice Rehnquist reasoned for a unanimous Court:

> The ordinary meaning of those words confers broad discretion on the court. The type of relief is not further specified, except that it must be "appropriate." Absent other reference, the only possible interpretation is that the relief is to be "appropriate" in light of the purpose of the Act.

Burlington, 471 U.S. at 369. This Court added that since administrative and judicial review could take years to complete, more than mere prospective injunctive relief is required when fashioning an appropriate remedy.

> ... we are confident that by empowering the court to grant "appropriate" relief, Congress meant to include retroactive reimbursement to parents as an available remedy in a proper case. ... Reimbursement merely requires the Town to belatedly pay expenses that it should have paid in the first instance had it developed a proper IEP...

Id., 471 U.S. at 371.

Based on the reasoning in Burlington, other courts have determined that

compensatory education is an appropriate remedy. In Miener v. State of Missouri, 800 F2d 749 (8th Cir. 1986), the father of a handicapped daughter sought compensatory education for her because she had been denied special education in accordance with several evaluations recommending such services. The father was unable to pay for private placement; the school district argued that the Burlington reasoning did not apply. The Court of Appeals rejected that argument:

> We cannot agree with the defendants that they should escape liability for these services simply because Clyde Miener was unable to provide them in the first instance; we believe that such a result would be consistent neither with Burlington nor with congressional intent. Like retroactive reimbursement in Burlington, imposing liability for compensatory educational services on the defendants "merely requires (them) to belatedly pay expenses that (they) should have paid all along," 105 S.Ct. at 2003. Here, as in Burlington recovery is necessary to secure the child's right to a free appropriate public education. Id. We are confident that Congress did

> not intend the child's entitlement to a free education to turn upon her parent's ability to "front" its costs.

Miener, 800 F.2d at 753 (emphasis in original). The court then articulated the standard of "appropriateness":

> Accordingly, we hold that the plaintiff is entitled to recover compensatory educational services if she prevails on her claim that the defendants denied her a free appropriate education in violation of the EHA.

Id., at 754. The Court then remanded the case for a determination on the merits, even though the "child" was at least 24 years old when the Eight Cricuit decided the case (since she was 14 in 1976; Id., at 751).

The Eleventh Circuit Court reached the same conclusion as the Eighth. Seven months after the Honig decision was issued, in Jefferson County Bd. of Educ. v. Breen, 853 F.2d 853 (11th Cir. 1988), that court affirmed both an award of tuition reimbursement and compensatory

education. In addition to the Miener Court's reasons, the Breen Court stated:

> Also, providing a compensatory education should serve as a deterrent against states unneccessarily prolonging litigation in order to decrease their potential liability.

Breen, 853 F.2d at 858.

The Second Circuit has also awarded compensatory education in Burr v. Ambach, 863 F.2d 1071 (2d Cir. 1988), vacated sub nom. Sobol v. Burr (1989), 109 S. Ct. 3209 (1989), reaffirmed, No. 116-88-7275, 16 EHLR 151 (2d Cir. Oct. 27, 1989. The Court of Appeals remanded the case to the district court with instructions to reinstate the administrative hearing officer's decision which had originally awarded the compensatory education. Id.

The most recent award of compensatory education was made in Lester H. v. Carroll 16 EHLR 10 (E.D. Pa., Nov. 9, 1989):

> Honig does not preclude an award of compensatory education beyond the age of 21 for denial of an appropriate

> education before 21. The issue in Honig was denial of education pending EHA procedural due process; Doe or Smith did not suffer significant deprivation of an appropriate placement since the district court had directed Doe's return to school and provided Smith with in-home instruction to which his parents agreed... The power to suspent and length of suspension were the issues in Honig, not compensatory education to rectify educational deprivation. Honig does not bar relief after age 21, as long as plaintiff is under 21 when the violation occurs. Liability terminates at 21 but if there is liability, an award of damages is not so limited.

Id. at 14, emphasis added. After a review of the case law, the Lester Court awarded compensatory education. Id.

While this Cross-Petitioner has spent considerable sums of money from the family's finances in behalf of Petitioner, none of the expenditures resulted in special education and related services appropriate to Petitioner's unique educational needs. For Petitioner, only compensatory special education and related services specifically designed for his

identified needs together with all damages due him under the circumstances will be appropriate and meaningful. Cross-Petitioner pleads Petitioner be granted such appropriate relief as well as any and all damages that will make him whole.

Because Petitioner is entitled to compensatory FAPE, services and damages, Cross-Petitioner further urges This Court to provide for the return of the following monies: (1) The 1974 psycho-educational evaluation and parent training at the Judevine Center for Autistic Children which was necessary to keep Petitioner in his home when Respondents refused him the residential placement then prescribed for him by the experts at Cleveland Metropolitan Hospital in 1974. (2) The 1975-76, 76-77, 77-78 car and travel expense for delivering Petitioner's lunches to the University School because Respondents refused to teach the then 12-, 13-, 14-year-old to prepare the simple

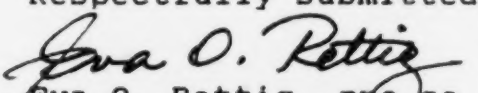
meals prescribed by Petitioner's physician when the other classmates were being taught to prepare their meals. (3) The , 1979 psycho-educational evaluation of Petitioner by Judevine staff necessitated by the so-called due process hearing. (4) The 1984 psycho-educational evaluation by Dr. LaVigna, a nationally renowned expert in autism, which was necessary because Respondents refused such appropriate expert help and which might have been used by Judge Lambros (1983-87) to fashion a remedy had Respondents not objected. (5) The 1987 psycho-educational evaluation by Dr. LaVigna when Petitioner was dismissed from school and denied any and all services despite this law suit's pendency, under the EHA's "Stay-Put" provision, before State Respondents. (6) All expenses, fees, costs, including fees for attorneys and expert witnesses for the entire litigation, 1978-90 and ongoing.

## CONCLUSION

Since the decision in Burlington, courts and administrative review officers have fashioned appropriate relief for handicapped children and their parents, including awarding compensatory education beyond the age limits set by States who receive funding under the EHA. The decision in Honig did not bar this remedy; it was not at issue. Honig merely held that an issue of school discipline was moot with regard to a handicapped child who was no longer in school and who had received his FAPE while of school age. Honig v. Doe, 484 U.S. 305, 318 (1988).

Cross-Petitioner humbly begs this High Court of Last Resort for an appropriate remedy for Petitioner Thomas M. Rettig and for herself.

Respectfully submitted,



Eva O. Rettig, pro se
586 Francis Street
Kent, Ohio 44240

(216) 678-0988

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In The

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October Term, 1990

EVA O. RETTIG,

*Cross-Petitioner,*

v.

THE KENT CITY SCHOOL DISTRICT, et al.,

*Respondents.*

## Cross-Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

## BRIEF OF RESPONDENTS IN OPPOSITION

DENNIS M. WHALEN
WHALEN & COMPTON CO., L.P.A.
565 Wolf Ledges Parkway
P.O. Box 2020
Akron, Ohio 44309-2020
Telephone: (216) 376-1112

*Counsel of Record for Respondents Kent City School District, Donna G. Lightel and Michael Chrin*

G. FREDERICK COMPTON, JR.
R. BRENT MINNEY
WHALEN & COMPTON CO., L.P.A.
565 Wolf Ledges Parkway
P.O. Box 2020
Akron, Ohio 44309-2020
Telephone: (216) 376-1112

*Counsel for Respondents Kent City School District, Donna G. Lightel and Michael Chrin*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

## QUESTIONS PRESENTED

1. Whether the cross-petition was properly and timely filed.

2. Whether the parent of a handicapped child who has not prevailed on any issue in this action is entitled to relief from this Court.

## LIST OF ALL PARTIES

| | |
|---|---|
| Petitioner: | Thomas M. Rettig |
| Cross-Petitioner: | Eva O. Rettig |
| Respondents: | Kent City School District<br>Donna G. Lightel (in her official capacity as Superintendent)<br>Michael J. Chrin (in his official capacity as Director of Child Study and Special Education)<br>Board of Education of the State of Ohio<br>Dr. Franklin B. Walter (in his official capacity as State Superintendent) |

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## OPINIONS AND JUDGMENTS BELOW

The decision of the Court of Appeals for the Sixth Circuit filed on August 29, 1990, is not officially reported. The Memorandum and Order of the United States District Court for the Northern District of Ohio, Eastern Division, filed on July 28, 1989, also is not officially reported.

## JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit was filed on August 29, 1990. The cross-petition for a writ of certiorari was filed on January 7, 1991. The cross-petition was not properly or timely filed, and this Court does not have jurisdiction.

## STATEMENT OF THE CASE

The case *sub judice* is the third in a series of cases initiated by Eva O. Rettig (hereinafter referred to as "the Cross-Petitioner") on behalf of her son, Thomas M. Rettig, pursuant to the provisions of the Education for All Handicapped Children Act of 1975 (hereinafter referred to as "the EAHCA"), 20 U.S.C. §1400 *et seq.* The Cross-Petitioner originally requested an impartial due process hearing on March 1, 1978, respecting the individualized education program (IEP) developed for Thomas during the 1978-1979 school year. On April 30, 1979, the impartial hearing officer issued a comprehensive opinion, which concluded that the Respondent, Kent City School District, was providing Thomas with a free appropriate

public education as required by the EAHCA. The State Board of Education affirmed the impartial hearing officer's decision.

Thereafter, the Cross-Petitioner initiated an action in the United States District Court for the Northern District of Ohio, Eastern Division, on November 30, 1979. The amended complaint filed in this action contained ten (10) causes of action related to Thomas' IEP for the 1978-1979 school year and raised claims relating to the years 1970 to 1978. The District Court rendered its final order on August 25, 1981. The District Court affirmed the impartial hearing officer's decision and found in favor of the Respondents on all but two (2) issues. The State Board of Education was ordered to amend an administrative rule to be consistent with the EAHCA, and the Kent City School District was ordered to incorporate one (1) hour of extracurricular activities each week into Thomas' 1981-1982 IEP. This decision of the District Court is officially reported as *Rettig v. Kent City School District*, 539 F.Supp. 768 (N.D. Ohio 1981).

The Cross-Petitioner appealed the District Court's decision to the United States Court of Appeals for the Sixth Circuit, and the Kent City School District filed a cross-appeal. The Court of Appeals vacated that portion of the District Court's decision mandating the inclusion of one (1) hour of extracurricular activities per week in the future IEP developed for Thomas and remanded this issue to the District Court for further consideration in light of the intervening decision of this Court in *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). In all other respects, the Court of Appeals affirmed the

District Court's judgment. This decision of the Court of Appeals is officially reported as *Rettig v. Kent City School District*, 720 F.2d 463 (6th Cir. 1983).

The decision of the Court of Appeals was appealed by the Cross-Petitioner to this Court, and on May 21, 1984, this Court entered its order dismissing the appeal or in the alternative denying the petition for a writ of certiorari. *Rettig v. Kent City School District*, 467 U.S. 1201, 104 S.Ct. 2379, 81 L.Ed.2d 339 (1984). This Court also denied the Cross-Petitioner's application for rehearing on June 18, 1984. *Rettig v. Kent City School District*, 467 U.S. 1257, 104 S.Ct. 3549, 82 L.Ed.2d 852 (1984).

Upon remand, the District Court affirmed its earlier decision respecting the provision of extracurricular activities. The Kent City School District appealed, and the Cross-Petitioner cross-appealed. On March 10, 1986, the Court of Appeals issued its decision, which reversed the judgment of the District Court and dismissed the Cross-Petitioner's cross-appeal, because it raised issues "that were fully litigated in the 1981 district court proceedings and have been previously resolved on appeal to this court and the United States Supreme Court." *Rettig v. Kent City School District*, 788 F.2d 328, 332 (6th Cir. 1986). The decision of the Court of Appeals was appealed by the Cross-Petitioner, and on June 30, 1986, this Court entered its order denying the petition for a writ of certiorari. *Rettig v. Kent City School District*, 478 U.S. 1005, 106 S.Ct. 3297, 92 L.Ed.2d 711 (1986).

Meanwhile, on September 29, 1982, the Cross-Petitioner requested a second impartial due process hearing. On December 16, 1982, the impartial hearing officer

issued her order dismissing the Cross-Petitioner's request, because she failed to specify the issues to be considered as required by the Ohio Administrative Code. This decision was affirmed by the State Board of Education after conducting a state level review.

Thereafter, the Cross-Petitioner commenced an action in the United States District Court for the Northern District of Ohio, Eastern Division, on July 15, 1983. The Respondents moved to dismiss this action on the grounds of *res judicata*, failure to exhaust administrative remedies, and failure to state a claim. Initially, these motions were denied by the Court; however, they were later renewed by the Respondents. On October 23, 1986, the Court dismissed the action after giving the Cross-Petitioner an opportunity to further amend the complaint to state a cause of action for the 1986-1987 school year. *Rettig v. Kent City School District*, Case No. C83-2881 (N.D. Ohio 1986, unreported).

Less than two (2) months later, on December 12, 1986, the Cross-Petitioner filed a request for a third impartial due process hearing. On January 30, 1987, the impartial hearing officer issued his decision in which it was concluded that the issues raised in the request were either not appropriate for a due process hearing or were already addressed in previous litigation between the parties. As a result, the impartial hearing officer sustained the Respondent school district's motion to dismiss. This decision was affirmed by the state level review officer in a decision rendered on April 6, 1987.

More than eight (8) months later, on December 31, 1987, the Cross-Petitioner commenced the present action

in the United States District Court for the Northern District of Ohio, Eastern Division. This latest complaint named as defendants the Kent City School District; Donna G. Lightel, Superintendent of the Kent City School District; and Michael J. Chrin, Director of Child Study and Special Education for the Kent City School District (hereinafter referred to as "the Local Respondents"). Also named as defendants were the State Board of Education and Franklin B. Walter, State Superintendent of Public Instruction (hereinafter referred to as "the State Respondents"). On January 25 and 26, 1988, the Local Respondents and the State Respondents, respectively, filed separate motions to dismiss predicated upon the grounds that the causes of action contained in the complaint were barred by the doctrine of *res judicata*; that the causes of action were barred by the applicable statute of limitations; that the Cross-Petitioner failed to exhaust mandatory administrative remedies; that the action was moot; that the complaint failed to state a claim upon which relief could be granted; and that the claims against the State Respondents were barred by the Eleventh Amendment and the doctrine of sovereign immunity. On July 28, 1989, the District Court filed its Memorandum and Order in which the Respondents' motions to dismiss were granted.

The Cross-Petitioner appealed the decision of the District Court to the United States Court of Appeals for the Sixth Circuit on September 20, 1989. Thereafter, on August 29, 1990, the Court of Appeals issued its decision, which affirmed the orders of the District Court dismissing the action and denying a new trial. The Court of

Appeals indicated its agreement with the reasoning articulated by the District Court and, further, concluded that the case is moot, since Thomas, by virtue of his age, is no longer entitled to the protections and benefits of the EAHCA.

Thereafter, on November 27, 1990, a petition for a writ of certiorari was filed in this Court on behalf of Thomas M. Rettig and assigned case number 90-6388. The present cross-petition was filed in this Court by Eva O. Rettig on January 7, 1991, and assigned case number 90-1088. The Respondents were granted an extension of time through and including February 22, 1991, in which to file a response to the cross-petition.

## SUMMARY OF ARGUMENT

The cross-petition has not been properly or timely filed in accordance with Sup. Ct. R. 12 and Sup. Ct. R. 13. Moreover, the contents of the cross-petition have no relevance to the issues addressed by the Court of Appeals. Finally, the District Court correctly determined that the Cross-Petitioner's action is barred by the doctrine of *res judicata*, and the Court of Appeals correctly held that it is moot.

## ARGUMENT

Sup. Ct. R. 13 reads, in pertinent part, as follows:

> .1. A petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort, a United States

court of appeals, or the United States Court of Military Appeals shall be deemed in time when it is filed with the Clerk of this Court within 90 days after the entry of the judgment. A petition for a writ of certiorari seeking review of a judgment of a lower state court which is subject to discretionary review by the state court of last resort shall be deemed in time when it is filed with the Clerk within 90 days after the entry of the order denying discretionary review.

.2. A Justice of this Court, for good cause shown, may extend the time to file a petition for a writ of certiorari for a period not exceeding 60 days.

.3. The Clerk will refuse to receive any petition for a writ of certiorari which is jurisdictionally out of time.

.4. The time for filing a petition for a writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate (or its equivalent under local practice). However, if a petition for rehearing is timely filed in the lower court by any party in the case, the time for filing the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment. A suggestion made to a United States court of appeals for a rehearing in banc pursuant to Rule 35(b), Federal Rules of Appellate Procedure, is not a petition for rehearing within the meaning of this Rule.

.5. *A cross-petition for a writ of certiorari shall be deemed in time when it is filed with the Clerk as provided in paragraphs .1, .2, and .4 of this Rule, or in Rule* 12.3. However, a cross-petition which, except for Rule 12.3, would be untimely, will not

be granted unless a timely petition for a writ of certiorari of another party to the case is granted.

* * *

(emphasis added)

In addition, Sup. Ct. R. 12 reads, in pertinent part, as follows:

* * *

.3. *Not more than 30 days after receipt of the petition for a writ of certiorari, counsel for a respondent wishing to file a cross-petition that would otherwise be untimely shall file, with proof of service as prescribed by Rule 29, 40 printed copies of a cross-petition for a writ of certiorari,* which shall comply in all respects with Rule 14, except that materials printed in the appendix to the original petition need not be reprinted, and shall pay the docket fee pursuant to Rule 38. The cover of the petition shall clearly indicate that it is a cross-petition. The cross-petition will then be placed on the docket, subject, however, to the provisions of Rule 13.5. It shall be the duty of counsel for the cross-petitioner to notify the cross-respondent, on a form supplied by the clerk, of the date of docketing and of the docket number of the cross-petition. The notice shall be served as required by Rule 29. A cross-petition for a writ of certiorari may not be joined with any other pleading, and the Clerk shall not accept any pleading so joined. The time for filing a cross-petition may not be extended.

.4. All parties to the proceeding in the court whose judgment is sought to be reviewed shall be deemed parties in this Court, unless the petitioner notifies the Clerk of this court in writing of the petitioner's belief that one or more of the parties below has no interest in the outcome of the petition. A copy of the notice shall be served as required by Rule 29 on all parties to the

> proceeding below. A party noted as no longer interested may remain a party by promptly notifying the Clerk, with service on the other parties, of an intention to remain a party. *All parties other than petitioners shall be respondents, but any respondent who supports the position of a petitioner shall meet the time schedule for filing papers which is provided for that petitioner,* except that a response to the petition shall be filed within 20 days after its receipt, and the time may not be extended.
>
> * * *
>
> (emphasis added)

In the case *sub judice,* the Cross-Petitioner states that "[s]he has been a party-plaintiff since 1978 and in This Court joins Petitioner * * * ." (Cross-Petition at p. 14). In fact, in all previous litigation between these parties, the Cross-Petitioner has been a party and a *pro se* advocate on behalf of herself and her son. The Cross-Petitioner's attempt, at this stage of the proceedings, to somehow separate herself from her autistic and mentally retarded son is a gross misrepresentation of the true state of affairs.

It is apparent that the Cross-Petitioner is truly not a "respondent" in this matter and, thus, does not have the right to file a cross-petition as contemplated by Sup. Ct. R. 12.3. Furthermore, even if one assumes *arguendo* that the Cross-Petitioner is a "respondent" in this matter, it is clear that she supports the petitioner, and, thus, her cross-petition should have been filed at the time that the original petition was filed as contemplated by Sup. Ct. R. 12.4 and Sup. Ct. R. 13.5. Consequently, it is respectfully submitted that the cross-petition was not properly or timely filed in this Court and should be dismissed.

The Respondents' second objection to the cross-petition is the fact that the whole petition is irrelevant in that it has no application to the present case. The entirety of the cross-petition ostensibly addresses the question of the relief to which a parent of a handicapped child, who is a prevailing party in an action brought under the EAHCA, is entitled. However, the fact of the matter is that the Cross-Petitioner has not prevailed in this matter or in any of the other administrative or legal proceedings that she has initiated. The case now before this Court was dismissed by the District Court pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure, and this dismissal was affirmed by the Court of Appeals.

The District Court dismissed the Cross-Petitioner's action on the grounds of *res judicata* and failure to exhaust administrative remedies. In *Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980), this Court stated that "[u]nder res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." 449 U.S. at 94, 101 S.Ct. at 414, 66 L.Ed.2d at 313. Moreover, in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981), this Court stated:

> This Court has long recognized that "[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." *Baldwin v. Traveling Men's Assn.*, 283 U.S. 522, 525, 51 S.Ct. 517, 518, 75 L.Ed. 1224 (1931). We have stressed that "[the] doctrine of *res judicata* is not a mere matter of practice or procedure inherited from a

> more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts . . . " *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299, 37 S.Ct. 506, 507, 61 L.Ed. 1148 (1917).
>
> 452 U.S. at 401, 101 S.Ct. at 2429, 69 L.Ed.2d at 110-111.
>
> (emphasis in original)

The Respondents have been involved almost continuously in administrative and legal proceedings concerning Thomas Rettig for a period of approximately thirteen (13) years, and have expended thousands of dollars in defending themselves against the Cross-Petitioner's repeated attempts to relitigate her claims. Previously, this Court declined to grant certiorari in an earlier case involving the same parties and the same issues, which the Petitioner and Cross-Petitioner are again seeking to present. In light of today's crowded dockets and the significant public interests served by the doctrine of *res judicata*, the District Court was correct in putting an end to this matter by dismissing the Cross-Petitioner's Complaint. The Court of Appeals affirmed the District Court's decision and also determined that this case is moot under this Court's decision in *Honig v. Doe*, 484 U.S. 305, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988). It is respectfully submitted that this Court should not disturb the decision of either of the lower courts.

## CONCLUSION

Based upon the foregoing, as well as the Brief in Opposition to the original petition filed on January 2, 1991, the contents of which are incorporated herein by reference, the Respondents respectfully urge this Court to deny both the petition for a writ of certiorari docketed as case number 90-6388 and the cross-petition for a writ of certiorari docketed as case number 90-1088.

Respectfully submitted,

DENNIS M. WHALEN
WHALEN & COMPTON CO., L.P.A.
565 Wolf Ledges Parkway
P.O. Box 2020
Akron, Ohio 44309-2020
Telephone: (216) 376-1112

*Counsel of Record for Respondents Kent City School District, Donna G. Lightel, and Michael J. Chrin*

G. FREDERICK COMPTON, JR.
R. BRENT MINNEY
WHALEN & COMPTON CO., L.P.A.
565 Wolf Ledges Parkway
P.O. Box 2020
Akron, Ohio 44309-2020
Telephone: (216) 376-1112

*Counsel for Respondents Kent City School District, Donna G. Lightel, and Michael J. Chrin*

Supreme Court, U.S.
FILED
FEB 27 1991
OFFICE OF THE CLERK

(3)

No. 90-1088

# IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

EVA O. RETTIG, Cross-Petitioner,

v.

KENT CITY SCHOOL DISTRICT;
DONNA G. LIGHTEL, In her Official Capacity as Superintendent, Kent Public Schools;
MICHAEL J. CHRIN, In his Official Capacity of Director, Child Study and Special Education, Kent Public Schools;
BOARD OF EDUCATION OF THE STATE OF OHIO;
FRANKLIN B. WALTER, In His Official Capacity as Superintendent for Public Instruction of the State of Ohio,
Respondents.

*CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## REPLY TO LOCAL RESPONDENTS' BRIEF IN OPPOSITION

EVA O. RETTIG, *pro se*
586 Francis Street
Kent, Ohio 44240
Tel.(216) 678-0988

## QUESTION PRESENTED

Whether a Petitioner who, under the provisions of the Handicapped Children's Protection Act, 20 U.S.C. 1415(e)(4), seeks recovery of all appropriate costs, including attorneys fees, and who has filed a timely Cross-Petition dependent upon the success of a properly and timely filed Original Petition, is entitled to all appropriate relief from This Court.

## LIST OF ALL PARTIES

Original Petitioner: Thomas M. Rettig

Cross-Petitioner: Eva O. Rettig

Respondents: Kent City School District; Donna G. Lightel, In her Official Capacity as Superintendent; Michael J. Chrin, In his Official Capacity of Director, Child Study and Special Education; Board of Education of the State of Ohio; Franklin B. Walter, In His Official Capacity as Superintendent of the State of Ohio.

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## OPINIONS AND JUDGMENTS BELOW

The 24-line "Opinion of the Sixth Circuit Court" was ordered to be unreported; Orig. Pet. App. VOL. III AA contains a true copy. A copy of the U.S. District Court's unpublished Memorandum Order is included in VOL. III A at 83-101. The exhaustion of administrative remedies required by the Education of the Handicapped Act (EHA) is documented in VOL. I.

## JURISDICTION

It appears that both sets of opposing counsel are deliberately misleading This Court by stating the same wrong date on which the Cross-Petition allegedly was filed. They are blatantly wrong in asserting that the Cross-Petition was filed on 7 Jan. 1991. See State's Waiver dated 5 Feb. 1991 and p. 1 of Local Respondents' Brief in Opposition filed on or about 21 Feb. 1991.

On 27 Nov. 1990 Thomas M. Rettig filed, *pro se* and *in forma pauperis*, his timely Petition. On that day he provided copies to

all parties below, including his mother. Since he lives with his parents, his mother received her copy on that day.

Because of their acts and omissions concerning her handicapped son, Respondents continue to owe Eva Rettig the return of several thousand dollars for various costs related to this lawsuit, including attorneys fees. When Thomas Rettig finally prevails on the merits, Respondents will be required to return to her what is rightfully hers.

For this reason, on 26 Dec. 1990, This Court timely received the filing fee and forty copies of her Cross-Petition which is contingent upon the success of the Original Petition. On 26 Dec. 1990 State Respondents received their three copies of the Cross-Petition; and Local Respondents received theirs on 28 Dec. 1990.

In a letter dated 2 Jan. 1991, Mrs. Loretta Ruffin, Assistant Clerk, returned 39 of the 40 copies, demanding certain minor corrections and a prompt return "in order for

the case to be docketed." The Court provided opposing counsel with copies of that letter.

Under cover of a letter dated 5 Jan. 1991, by express mail, Cross-Petitioner returned to This Court the 39 corrected Cross-Petitions. Respondents' counsel were mailed copies of the letter together with directions to page and line of the Cross-Petition where the corrections (with gummed backing) were to be inserted. As mailed to opposing counsel, the corrections were the same as those inserted by Cross-Petitioner in the 39 copies returned to the Court.

By letter dated 10 Jan. 1991, Assistant Clerk Ruffin informed Mrs. Rettig that her Cross-Petition "was docketed in this Court on December 26, 1990 as No. 90-1088." Enclosed were forms "for notifying opposing counsel that the case was docketed."

On 13 Jan. 1991, Eva Rettig duly notified opposing counsel that her Cross-Petition was docketed on 26 Dec. 1991.

Since it is dependent on the success of the Original Petition timely and properly filed by Thomas Rettig, the Cross-Petition for costs, including attorneys fees, was timely and properly filed 29 days after receipt of the Original Petition. *See* S. Ct. R. 12.3. For these reasons, This Court has jurisdiction to grant both the Original and Cross-Petitions. This Court is urged to invoke its statutory power under 28 U.S.C. 2106.

## STATUTORY PROVISIONS INVOLVED

State Respondents filed no brief in opposition to either of the two petitions wherein they should have presented those provisions of law supporting their brief. Local Respondents filed two such briefs, but neither brief contained a section addressing the "Constitutional, Statutory, etc. Provisions Involved." Since Respondents did not include their own version of required provisions upon which they base their briefs in opposition, This Court must now conclude that all Respondents are "satisfied with their

presentation by the other side." S. Ct. R. 24.2. provides in pertinent part:

> Items required by subparagrahps .1. ... (f) of this Rule need not be included unless the respondent ... is dissatisfied with their presentation by the other side.

The "other side" consists of two (2) parties. Each party filed a Petition based upon those provisions of law appropriate to the individual's circumstances. (1) Thomas M. Rettig filed the Original Petition citing the constitutional and statutory provisions whose text he filed as Volume IV of the required appendix to said Petition. He also filed a Reply Brief. (2) Relying on that Original Petition, and on the provisions of the Handicapped Children's Protection Act (HCPA) which, in 1986 amended the EHA, the mother of the Original Petitioner filed a Cross-Petition for the return of her monies, including attorneys fees. This Court must now conclude that all Respondents were fully satisfied with the provisions of law "presented by the other side." Dissatisfied respondents must include in their briefs in

opposition their own section of provisions of law upon which they base their arguments. *See* S. Ct. R. 24.1. State Respondents filed no briefs and Local Respondents' briefs contain no such provisions.

The Cross-Petition specifically relies on the Original Petition, its four-volume Appendix, and on the following provisions of the HCPA:

> SEC. 2. Section 615(e)(4) of the Education of the Handicapped Act is amended by inserting "(A)" after the paragraph designation and by adding at the end thereof the following new subparagraphs:
>
> AWARD OF ATTORNEYS FEES
>
> "(B) In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys fees as part of the costs to the parents or guardian of a handicapped child or youth who is the prevailing party.
>
> EFFECT OF EDUCATION OF HANDICAPPED ACT ON OTHER LAWS
>
> SEC. 3. Section 615 of the Education of the Handicapped Act is amended by adding at the end thereof the following new subsection:
> "(f) Nothing in this title shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973, or other

Federal statutes protecting the rights of handicapped children and youth, except that before the filing of a civil action under such laws seeking relief that is also available under this part, the procedures under subsections (b)(2) and (c) shall be exhausted to the same extent as would be required had the action been brought under this part.".

EFFECTIVE DATE

SEC. 5. The amendment made by section 2 shall apply with respect to actions or proceedings brought under section 615(e) of the Education of the Handicapped Act after July 3, 1984, and actions or proceedings brought prior to July 4, 1984, under such section which were pending on July 4, 1984.

Approved August 5, 1986.

Orig. Pet. App. Vol. IV. Based upon Sec. 3 above, the Original Petitioner seeks the full enforcement of his rights to compensatory free appropriate public education (FAPE), services, and damages. Based upon Secs. 2 and 5 above, Cross-Petitioner seeks the return of the vast sums of monies she spent because of Respondents' denial of FAPE and services to her son while a handicapped child, and because of State Respondents' repeated denials of his right to due process each time his administrative complaint

reached them for review.

It is under this law that State Respondent's Waiver and Local Respondents' Briefs must be scrutinized, because they present no other Constitutional or statutory provisions to This Court.

## STATEMENT OF THE CASE

Since State Respondents filed no brief in opposition, they provided no "statement of facts." However, they filed an "express waiver" filled with misstatements and omissions. As documented by the administrative record, State Respondents have repeatedly refused the Original Petitioner his right to due process before affirming and joining in Local Respondents' denial of his right to FAPE and services throughout his school-age years. *See* Orig. Pet. App. VOL. I 96-108; 117-119; 127; 131-133; and VOL. II 142-152; 157-158f; 171-173; 177-177a; 280-296; 308-311. Further, since 1979, State Respondents have not only been affirming Local Respondents, but have been joining them

in opposing Petitioner in the Federal courts.

No Federal court has ever reviewed the so-called procedural safeguards which State Respondents accorded Petitioner when his complaints against Local Respondents reached them. *See* Orig. Pet. App. VOL. III. Petitioner Thomas Rettig cannot win his case on its mertis as long as the Federal courts refuse to review the empty State procedures accorded him by State Respondents. He cannot win his case on the merits against Local Respondents until those State procedures are declared violative of his Federal rights. Once the appropriate Federal Court adjudicates those less than meaningless so-called due process procedures, that Court will also finally adjudicate Local Respondents' violative acts and omissions concerning Thomas Rettig.

Until those declarations are made by the appropriate Court, there is also no chance that Cross-Petitioner will have returned to her the vast sums of money squeezed from the

family's coffers precisely because these cruel Respondents have been mercilessly denying innocent and helpless Thomas Rettig his basic rights to due process and equal protection of the law.

To that end, on 12/12/86, while Thomas Rettig was yet entitled to the protections and benefits of the EHA, he filed his own administrative complaint followed by his own Federal complaint, his own briefs, and his own Petition in This Court. To the point that his parents' EHA rights to participation in the development of a FAPE are part and parcel of all applicable law, those rights denied them are included in Thomas Rettig's Petition and Reply Brief which demonstrate, based on the administrative and court record appended to his Petition, the willfull and total denial of FAPE and services to Thomas Rettig. His parents will be accorded their right to participation when This Court of Last Resort provides or provides for the enforcement of Thomas Rettig's rights.

Cross-Petitioner's right to have her monies returned is directly tied to her son's success on the merits. Therefore, she now incorporates by reference herein his Petition's Statement of Facts and Reasons For Granting his Petition; and his Reply Brief.

Her Cross-Petition included only those Facts which were germane to her issue of the monies she expects to have returned to her. She included this issue in the administrative complaint, as required by the EHA/HCPA, and carried it all the way through the administrative and court procedures.

In their Waiver, State Respondents completely ignored the issue which, in large part, is due to their refusals to accord Thomas Rettig his EHA due process right to equal protection of the law. Had they done their part, Cross-Petitioner might have been spared the expense of thirteen years of litigation.

The Statement of Facts contained in Local Respondent's brief opposing the Cross-

Petition ignores its content completely by writing it off as "irrelevant." Their Statement suffers from critical omissions concerning the rights of Original Petitioner Thomas Rettig. It improperly commingles his rights with those of his parents' and it openly misrepresents the rights of the Cross-Petitioner. For these reasons, Cross-Petitioner directs This Court to her Cross-Petition's Statement of Facts which she incorporates herein by reference.

## SUMMARY OF ARGUMENT

The Cross-Petition is based upon the provisions of the HCPA concerning recovery of costs, including attorneys fees. It was properly and timely filed in accordance with S. Ct. R. 12.3. Because of its dependency on the timely filed Original Petition's success, it will be granted under the provisions of S. Ct. R. 13.5. The District Court denied all relief. *See* Orig. Pet. App. VOL. III A 94. Appellate review thereof was withheld. *See* AA 7-8. The District Court incorrectly

applied several bars to Petitioner Thomas Rettig's claims to due process and equal protection, including *res judicata*, which directly and adversely impacted on Cross-Petitioner's issue. To the litany of wrongful applications of various bars the Sixth Circuit Court's Memorandum Order added yet another: mootness. Because of the manifest injustice, This Court is urged to invoke its statutory power under 28 U.S.C. 2106.

## ARGUMENT

In their 5 Feb. 1991 Waiver, State Respondents assert that the Cross-Petition is "frivolous." Their reason is a purported untimeliness under the rules of this Court. Cross-Petitioner directs This Court to the section entitled "Jurisdiction," above, which she now incorporates herein. The Cross-Petition was timely filed.

In that same Waiver, State Respondents further attack the Cross-Petition "because Mrs. Rettig stands as a potential petitioner in this case and not a respondent to her

son's petition... She is ineligible to claim status as a cross-petitioner under R. 12.3."

As stated above, the award of all costs related to this litigation, 1970 to present, is authorized by the HCPA, as quoted above, and is contingent upon the success on the merits of the handicapped Original Petitioner who continues to seek enforcement of his rights to due process and equal protection which Respondents denied him while he was a handicapped child. Between 12 Dec. 1986 and 31 July 1987, while still a handicapped child, he exhausted the administrative procedures required by the EHA/HCPA before he brought his improperly dismissed present complaint in Federal court.

It was under this same law, as stated above, that Cross-Petitioner exhausted her administrative remedies and thus far unsuccessful Federal court procedures concerning her own issue. Her own issue will not be resolved until the acts and omissions of State Respondents are adjudicated. For

this reason, she filed her issue as a Cross-Petition dependent on her son's Original Petition. S. Ct. R. 12.3 fit her particular circumstances perfectly. She also consulted R. L. Stern, *et al.* Supreme Court Practice 380 (6th ed. 1986). This eminent authority states:

> A cross-petition for certiorari is a petition filed after another party has already filed a petition in the same case. Although one usually thinks of a cross-petition as opposing the position of the initial petitioner, the rules read literally do not contain any such limitation.

For these reasons, Cross-Petitioner properly filed her timely Cross-Petition dependent upon her son's Original Petition which he properly and timely filed. As presented in their Waiver, State Respondents' arguments are mere sham. This Court should recognize them as bogus.

In their Brief in Opposition to the Cross-Petition, Local Respondents present the same bogus argument made by the State which This Court is urged to disregard as well. Beyond that argument, Local Respondents

"object to the cross-petition" for a purported lack of "relevancy" in its "application to the present case." *See* p. 10. They then argue that the Cross-Petitioner has not been successfull in vindicating her right to recovery of all monies due her. However, their argument completely ignores the conditions under which this Cross-Petitioner will be successful: Only when the Original Petitioner succeeds on the merits of his case. For more than twenty years, Local Respondents have denied Thomas Rettig's right to equal protection under the law. For thirteen years, these Respondents have stood in the way of vindicating the Original Petitioner's rights to due process and equal protection. They all know, as This Court knows, that unless the Original Petitioner's rights are enforced by the appropriate Court, Cross-Petitioner's issue will remain unadjudicated. The family's limited resources will have been wasted on empty procedures totally meaningless to a beloved son, brother, and grandson.

The State of Ohio's policy to refuse due process to its handicapped children and their parents will remain unchecked. The EHA's expressed purpose and public policy of extending FAPE to handicapped children, and their guaranteed rights to challenge and vindicate their right to equal protection under the law will remain defeated.

## CONCLUSION

Based upon the foregoing, as well as the Original Petition and the Cross-Petition, the contents of which are incorporated herein by reference, and based upon This Court's review of the documents contained in the four volumes to the Original Petition, Cross-Petitioner fervently prays that This Court grant both Thomas Rettig's Original Petition docketed as case number 90-6388 and her Cross-Petition docketed as case number 90-1088.

Respectfully submitted.

Eva O. Rettig
EVA O. RETTIG, pro se
586 Francis Street
Kent, Ohio 44240
Tel.(216) 678-0988